FEDERAL COURT OF AUSTRALIA

Villani v Holcim (Australia) Pty Ltd [2011] FCAFC 155

|  |  |
| --- | --- |
| Citation: | Villani v Holcim (Australia) Pty Ltd [2011] FCAFC 155 |
|  |  |
| Parties: | **GIUSEPPE VILLANI v HOLCIM (AUSTRALIA) PTY LTD T/A HOLCIM AND FAIR WORK AUSTRALIA COMPRISING COMMISSIONER GOOLEY, SENIOR DEPUTY PRESIDENT KAUFMAN, DEPUTY PRESIDENT SAMS AND COMMISSIONER GAY** |
|  |  |
| File number: |  |
|  |  |
| Judges: |  |
|  |  |
| Date of judgment: | 2 December 2011 |
|  |  |
| Catchwords: | **INDUSTRIAL LAW** - employment - termination - whether Fair Work Australia's determination that termination not harsh, unjust or unreasonable the result of jurisdictional error - requests by employer to provide information about employee's possible conflict of interest - employee alleged to be conducting trucking business carting concrete for employer's business rival - whether open to Fair Work Australia to take into account failure of employee and his solicitors to provide information - whether inquiries related to a matter beyond the scope of the employment relationship |
|  |  |
| Legislation: | *Judiciary Act 1903* (Cth) s 39B*Fair Work Act 2009* (Cth) ss 387, 562, 563, 570, 604 |
|  |  |
| Cases cited: | *Edwards v Giudice* (1999) 94 FCR 561*Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) HCA 32 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 *Villani v Holcim (Australia) Pty Ltd t/as Holcim* [2011] FWA 141  |
|  |  |
| Date of hearing: | 4 November 2011 |
|  |  |
| Place: |  |
|  |  |
| Division: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 22 |
|  |  |
| Counsel for the Applicant: | Mr G Grabau |
|  |  |
| Solicitor for the Applicant: | Aloe & Co Pty Ltd  |
|  |  |
| Counsel for the Respondents: | Mr RA Millar  |
|  |  |
| Solicitor for the Respondents: | Monahan + Rowell |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 339 of 2011 |

|  |  |
| --- | --- |
| BETWEEN: | GIUSEPPE VILLANIApplicant |
| AND: | HOLCIM (AUSTRALIA) PTY LTD T/A HOLCIMFirst RespondentFAIR WORK AUSTRALIA COMPRISING COMMISSIONER GOOLEY, SENIOR DEPUTY PRESIDENT KAUFMAN, DEPUTY PRESIDENT SAMS AND COMMISSIONER GAYSecond Respondent |

|  |  |
| --- | --- |
| JUDGES: | GRAY, MARSHALL AND BROMBERG JJ |
| DATE OF ORDER: | 4 November 2011 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the first respondent’s costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
|  |  |
| BETWEEN: | GIUSEPPE VILLANIApplicant |
| AND: | HOLCIM (AUSTRALIA) PTY LTD T/A HOLCIMFirst RespondentFAIR WORK AUSTRALIA COMPRISING COMMISSIONER GOOLEY, SENIOR DEPUTY PRESIDENT KAUFMAN, DEPUTY PRESIDENT SAMS AND COMMISSIONER GAYSecond Respondent |

|  |  |
| --- | --- |
| : | GRAY, MARSHALL AND BROMBERG JJ |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# THE COURT

## The nature and history of the proceeding

1. On 4 November 2011 the Court made orders in this application. It dismissed the application and ordered the applicant to pay the first respondent’s costs of the proceeding. What follows are the reasons for making that order.
2. Giuseppe Villani applied to the Court, pursuant to s 39B of the *Judiciary Act 1903* (Cth) (“Judiciary Act”), for constitutional writs of certiorari and mandamus in respect of a decision of a Full Bench of Fair Work Australia (“FWA”), which refused him permission to appeal from a decision of a FWA Commissioner. To make out his case, Mr Villani needed to show that the decision of the Full Bench was affected by jurisdictional error. We are of the view that there was no such error.

## The application to Fair Work Australia

1. Pursuant to s 394(1) of the *Fair Work Act 2009* (Cth) (“the Fair Work Act”), Mr Villani applied to FWA for a remedy for unfair dismissal from his employment by Holcim (Australia) Pty Ltd (“Holcim”). By s 390(1) of the Fair Work Act, FWA may order reinstatement or the payment of compensation to a person who has been unfairly dismissed. In his application, Mr Villani gave as the reasons for his dismissal:

1 Failure to respond to written communications.

2 Allegedly breached Holcim’s Code of Ethics and Business Conduct.

3 (See attached letter).

1. The letter attached was Holcim’s letter of dismissal. That letter set out the following history:

On 1 March 2010, a meeting was held at Holcim’s Kew offices, in attendance were you, Jeff Moss and Kelvin Sargent. At the meeting it was raised that we believe you have financial interest [*sic*] in a concrete agitator truck that was working for a competitor of our company. In summary we believed you had breached Holcim’s Code of Ethics and business conduct. You declined to answer any questions and requested we send any enquires [*sic*] to you in writing.

On 2nd March a written communication detailing our previous day’s discussions was forwarded to you requesting you respond by 10th March 2010.

On 10th March 2010 we received written communication from Aloe & Co Pty Ltd on your behalf advising that you had not breached Holcim’s Code of Conduct but no details of your business were provided.

On 20th March 2010, Monahan & Rowell Lawyers, acting on Holcim’s behalf forward [*sic*] a written communication to Aloe & Co Pty Ltd, in summary requesting full disclosure of your business and financial interests that are potentially in conflict with your obligations as a Holcim employee. A response was requested by 7 April 2010. No response was received.

On 26th March 2010 AWU applied to Fair Work Australia to deal with a dispute, a hearing date was subsequently scheduled and occurred on 29th April 2010; [*sic*]

On 19th April 2010, a follow up letter was forwarded to Aloe & Co Pty Ltd advising that a response had not been received to the previous communication and requested [*sic*] a response by 21st April 2010.

To date a response has not been received to our communications dated 20 March and 19 April 2010 and accordingly we have reviewed the circumstances on the available information to us [*sic*].

1. The letter then gave as reasons for the dismissal:

You have failed to respond to our written communications dated 20 March and 19 April 2010;

You have breached Holcim’s Code of Ethics and Business Conduct;

Your continued employment with Holcim as a Concrete Plant - Man In Charge while operating a concrete cartage business for a competitor places you and our company in a position of conflict and is an untenable arrangement.

1. Mr Villani’s application claimed that the dismissal was unfair because:

1 Solicitor acting on my behalf responded to Solicitor acting on behalf of the company.

2 No breach of company policy took place.

3 Matter was heard before FWA as a dispute. Company has had no discussions with me following FWA hearing.

1. The clause of Holcim’s Code of Ethics and Business Conduct to which Holcim drew attention in its letter to Mr Villani dated 2 March 2010 was Clause 8.1, headed “Employees with Outside Interests or Businesses”. It provided relevantly that “employees shall not…Perform or enter into any trade or business in direct or indirect competition with” Holcim or “Derive revenues or benefits from…competitors” of Holcim.

## The decision of the Commissioner

1. By s 385 of the Fair Work Act, “A person has been ***unfairly dismissed*** if FWA is satisfied that” four criteria are met. One criterion is found in para (b), namely that “the dismissal was harsh, unjust or unreasonable”. Section 387 provides relevantly that:

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

(a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and

…

1. any other matters that FWA considers relevant.
2. On 12 January 2011, Commissioner Gooley published reasons for the decision in which she dismissed Mr Villani’s application (*Villani v Holcim (Australia) Pty Ltd t/as Holcim* [2011] FWA 141). In considering whether she was satisfied that the dismissal was harsh, unjust or unreasonable, the Commissioner referred to s 387(a) of the Fair Work Act. She described the case as one of alleged misconduct and, after referring to *Edwards v Giudice* (1999) 94 FCR 561, expressed the view that, in such a case, the function of FWA was to determine whether the misconduct occurred. The Commissioner began this task by discussing whether there had been any breach of Mr Villani’s common law obligation to avoid conflicts of interest between his personal interests and those of his employer. She answered this question in the negative, saying that there was “a mere apprehension that Mr Villani will act in a manner incompatible with his duty to his employer.” The Commissioner then determined that Mr Villani had not been in breach of Holcim’s Code of Ethics and Business Conduct by being in direct or indirect competition with Holcim. To the extent to which he had derived income from a competitor, there were drivers who delivered for both Holcim and the competitor concerned, and any breach of the Code by Mr Villani in this respect was inadvertent.
3. The Commissioner then dealt with Mr Villani’s failure to respond to Holcim’s correspondence. Her reasoning on this issue was as follows:

**[68]** Whatever Mr Villani’s ignorance of his obligations prior to 1 March 2010. [*sic*] I find that from the meeting on 1 March 2010 he was on notice that the operation of the concrete truck for Hanson was a barrier to him returning to work. I do not accept Mr Villani’s evidence that Mr Sargent did not mention Hanson in the meeting on 1 March 2010. In any event in his letter dated 2 March 2010 Mr Sargent put Mr Villani on notice that the issue was his financial interest in an agitator concrete truck which worked for a competitor of Holcim.

**[69]** I do not accept that Mr Villani’s solicitor did not advise him of the subsequent letters. This is not consistent with his own witness statement which sets out the exchange of correspondence.

**[70]** Nor do I consider it unreasonable for Holcim to have communicated with Mr Villani’s solicitors particularly when Mr Villani had requested that communication about this matter be put in writing and Mr Villani’s solicitors advised Holcim that they were acting for him in this matter.

**[71]** I also find that Holcim were entitled to ask Mr Villani the questions they did and to require him to respond. Mr Villani was wrong in concluding that his business dealings were none of Holcim’s business.

**[72]** Mr Villani received legal advice about the letter dated 2 March 2010. He knew Holcim were concerned about his work with Hanson. His answer that he did not receive income from a competitor was not true.

**[73]** Importantly he was provided with three opportunities to put forward submissions about why no conflict arose and he did not do so.

**[74]** It is unfortunate that Mr Villani did not engage with the issue raised by Holcim. He may have been able to establish to Holcim’s satisfaction that no conflict of interest existed or Mr Villani may have understood Holcim’s concerns and divested himself of the truck as he offered to do at the hearing.

**[75]** This did not occur, and these circumstances, where the employer has a genuine, albeit arguably misguided, concern about a potential conflict of interest, and the employee refuses to respond to those concerns [*sic*], leads [*sic*] me to conclude that there was a valid reason for the termination of Mr Villani’s employment.

1. The Commissioner then dealt with the other matters that s 387 of the Fair Work Act required her to take into account. The matters she considered relevant, pursuant to s 387(h), were Mr Villani’s long length of service (over 20 years); the financial position he was in when he commenced performing work for the competitor referred to at [9] above; the fact that he had been ill; and that he did not commence performing this work until he was cleared to return to light duties but was unable to return to work at Holcim. The Commissioner then expressed her conclusion as follows:

**[83]** I have found that Mr Villani’s refusal to respond to Holcim’s requests for information or more importantly his refusal to put to Holcim the reasons why conducting his business was not in conflict with his position as Man in Charge was a valid reason for the termination of his employment. I have found that the other reasons relied upon by Holcim do not support a finding that there was a valid reason for the termination of his employment.

**[84]** I have also found that Mr Villani was not told that a failure to respond to the letters dated 30 March and 19 April 2010 would be an independent reason for the termination of his employment.

**[85]** In reaching my decision I am required to ensure that a fair go all round is accorded to both employer and employee.

**[86]** While I have sympathy for Mr Villani I accept the submissions of Holcim that in the face of Mr Villani’s refusal to respond to their concerns they were left them [*sic*] with no option but to act on the information before them and their assessment of the potential conflict of interest and to terminate his employment. In those circumstances the termination was not harsh, unjust or unreasonable and I therefore dismiss the application.

## The decision of the Full Bench

1. Mr Villani applied to the Full Bench of FWA under s 604 of the Fair Work Act for permission to appeal from the Commissioner’s decision. Section 400(1) of the Fair Work Act provides that FWA must not grant permission to appeal from a decision made under Pt 3-2 (a decision in an unfair dismissal case) unless FWA considers that it is in the public interest to do so. Section 400(2) provides that an appeal from a decision in relation to a matter arising under Pt 3-2, to the extent that it is an appeal on a question of fact, can only be made on the ground that the decision involved a significant error of fact.
2. On 12 April 2011, the Full Bench of FWA refused Mr Villani permission to appeal. It considered that the public interest was not raised in the matter before it. Senior Deputy President Kaufman, announcing the decision of the Full Bench of FWA, said:

We are also of the view that the Commissioner did not err in finding that there was a valid reason for the termination of Mr Villani’s employment. A failure to engage in the conversation to reply to questions that were clearly relevant to the employer’s interests in establishing whether or not Mr Villani’s ownership of or interest in and/or driving of a concrete truck for a competitor was clearly a relevant matter to which the employer was entitled to expect an answer. Failing to provide that level of detail was upon Mr Villani’s head and the termination of his employment in those circumstances was not harsh, unjust or unreasonable.

## The application to the Court

1. Mr Villani’s application to the Court contained five grounds:

1. The tribunal (which expression describes both the single Fair Work Australia Commissioner at first instance and the reviewing Full Bench of Fair Work Australia of three members) acted beyond jurisdiction in taking into account a matter extraneous to the employment relationship which was the response or perceived inadequate response by a third party: [*sic*] the legal representative of the applicant as a valid reason for dismissal.

2. Having regard to the findings of the Tribunal and in particular

(a) that there was no finding that the applicant was in breach, either of his employment contract nor of the relevant code of conduct, [*sic*]

(b) that there was a mere apprehension that the applicant may act in a manner incompatible with his duty to his employers;

(c) That the there [*sic*] was no conflict of interest or breach of any duty or obligation relating to confidential information;

The commission was in error, jurisdictional and otherwise in finding that the response or perceived inadequate response by third party or parties being legal reps [*sic*] and union as a valid reason for dismissal. Further this constituted error as to jurisdiction in that the tribunal took account of matters that it did not have jurisdiction to take into account.

3. The Commission erred as to jurisdiction and otherwise in failing determine [*sic*] the matter in accordance with the objects of the **Fair Work Australia Act** 2009and [*sic*] particularly disability discrimination when the uncontested evidence of the applicant was that his problems with his employer all stemmed initially from the applicant’s condition of cancer of the bladder.

4. The Commission erred as to jurisdiction and/or otherwise in failing to construe the **Fair Work Australia Act**2009 [*sic*] in conformity with its objects and the general protection provisions which proscribe certain discriminatory conduct in circumstances where the applicant had suffered from a disability: namely bladder cancer and its aftermath and consequences.

5. The Full Bench of the Commission erred as to jurisdiction and/or otherwise in determining that the appeal to the full bench [*sic*] did not raise a matter of public interest when the subject matter did so.

1. In the course of the hearing of the application, counsel for Mr Villani abandoned the grounds relating to disability discrimination, grounds 3 and 4. Counsel for Mr Villani did not press any submission relating to ground 5. Nor could he, as that ground clearly raised matters going to the merits of the decision of the Full Bench of FWA and did not raise any question of jurisdictional error. In the end, the application fell to be determined on the argument that, in basing the decision on the failure of Mr Villani to respond to Holcim’s inquiries about his business interests, the Commissioner (and therefore the Full Bench of FWA) took into account matters that were irrelevant to the performance of FWA’s function under s 390 of the Fair Work Act. This was said to be because the inquiries related to a matter beyond the scope of the employment relationship.

## Jurisdictional error

1. The exercise of the power conferred on FWA by s 390(1) of the Fair Work Act, to order reinstatement or the payment of compensation, is conditioned by para (b) on the person having been unfairly dismissed. By s 385(b), FWA can only find that a person has been unfairly dismissed if FWA was satisfied that the dismissal was harsh, unjust or unreasonable. The “jurisdictional fact” or criterion upon which the exercise of that authority is “conditioned” is therefore not the objective existence of the fact of a dismissal that is harsh, unjust or unreasonable, but the satisfaction of FWA that there has been a dismissal that is harsh, unjust or unreasonable. See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) HCA 32 at [37] per Gummow and Hayne JJ, with whom Gleeson CJ agreed, and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [40] per Gummow ACJ and Kiefel J and [102] per Crennan and Bell JJ. A person who has been denied a remedy by FWA in an unfair dismissal case cannot therefore have the decision overturned in this Court on the basis that the Court finds that the dismissal was harsh, unjust or unreasonable. That is a matter of the merits of the controversy about the dismissal, and is solely within the province of FWA. Only if FWA fails to achieve satisfaction of the fact that the dismissal was harsh unjust or unreasonable by reason of jurisdictional error can such a person succeed in this Court.
2. In the present case, as we have said, the allegation that there was jurisdictional error came down to the proposition that Mr Villani’s failure to respond to inquiries about his business interests was irrelevant to the function of FWA, because the inquiries related to a matter that was beyond the scope of the employment relationship. The conduct relied upon by the Commissioner as constituting the valid reason for the termination of Mr Villani’s employment was not the conduct by Mr Villani of his own business, a matter which may well be outside of the employment relationship. The conduct upon which the Commissioner relied was the failure of Mr Villani to respond to questions which the Commissioner determined Holcim, as Mr Villani’s employer, was entitled to ask. The subject matters upon which and the extent to which an employer is entitled to require an employee to answer questions will depend upon the rights conferred upon the employer by the contract of employment with the employee. The Commissioner’s finding that Holcim was entitled to ask and require a response was a finding about Holcim’s rights arising from its employment relationship with Mr Villani. It was not a finding about a matter extraneous to that relationship. The finding was clearly within the Commissioner’s jurisdiction to make. The fact that the Commissioner subsequently found that there was in fact no conflict did not entitle Mr Villani to have FWA disregard his failure to respond to inquiries. The fact that inquiries were made through solicitors did not make those inquiries extraneous to the employment relationship, in circumstances where Mr Villani had chosen to communicate with Holcim through solicitors. The facts surrounding the inquiries and the lack of response to them were relevant to the Commissioner’s task of determining whether Mr Villani’s dismissal was harsh, unjust or unreasonable, as a step to determining whether there was a valid reason for that dismissal, a matter that the Commissioner was required to determine.
3. Even if it be recognised that the facts of the case might have been viewed differently, and FWA might have found that there was no valid reason for dismissing Mr Villani on the basis that he had failed to respond to inquiries about his business interests, that is not a ground on which this Court can overturn the decision of FWA. Any error in fact-finding, or in reasoning, on the part of FWA is not a jurisdictional error, but is an error within jurisdiction. It is not open to the Court to take a different view of the facts, or of the conclusion drawn from the facts, from that taken by FWA.
4. It follows that there was no jurisdictional error on the part of the Commissioner, or on the part of the Full Bench in refusing permission to appeal. The application to the Court must be dismissed.

## Costs

1. Holcim applied for a costs order in its favour as a result of its successful defence in this proceeding. Section 570 of the Fair Work Act provides relevantly:

(1) A party to proceedings (including an appeal) in a court….exercising jurisdiction under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2)…

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs; or

(c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before FWA;

1. the matter arose from the same facts as the proceedings.
2. Counsel for Holcim submitted that the Court, in considering Mr Villani’s application, was exercising jurisdiction conferred on it by s 39B of the Judiciary Act. Counsel did not refer to ss 562 and 563 of the Fair Work Act. Section 562 confers jurisdiction on the Court “in relation to any matter…arising under this Act”. Section 563(1)(b) provides:

The jurisdiction conferred on the Federal Court under s 562 is to be exercised in the Fair Work Division of the Federal Court if: …

…

(b) a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Act.

Mr Villani sought that a writ of mandamus be issued and directed to FWA.

1. The relationship between s 39B of the Judiciary Act and ss 562, 563 and 570 of the Fair Work Act was not explored by counsel before us. However, counsel for Mr Villani conceded that, if unsuccessful, his client should pay the costs of this application. We acted on that concession and accordingly made an order for costs against Mr Villani.

|  |
| --- |
| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gray, Marshall and Bromberg. |

Associate:

Dated: 2 December 2011